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Nos. 82-818, 82-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
Respondent.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
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v.
NATIONAL LABOR RELATIONS BOARD AND BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

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MOTION BY THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The International Brotherhood of Teamsters (IBT) hereby moves for leave to file a brief as *amicus curiae* arguing that the decision of the United States Court of Appeals for the Third Circuit was wrongly decided. Bildisco and Bildisco, Debtor-in-Possession, Respondent, has denied its consent to the filing of said brief.

INTEREST OF THE IBT AND ISSUES TO BE COVERED IN ITS BRIEF AMICUS CURIAE

The IBT is an international union comprised of 715 affiliated local unions, including Teamsters Local 408, a Petitioner before this Court. The collective membership of the IBT's affiliates totals approximately 1.8 million working men and women. Some 80,000 to 100,000 different collective bargaining agreements cover Teamsters-represented employees in this country.

The IBT represents many workers in industries which are presently in a state of economic decline. The conflict presented in this case has already and will continue to have a particularly severe impact on these workers. The IBT is vitally interested in the maintenance of sound collective bargaining relationships with bankrupt employers undergoing reorganization and in the preservation of their employees' rights created by collective agreements.

The IBT and its affiliated local unions have recognized the needs of employers undergoing financial problems and have sought to bargain with them to avoid business collapse and loss of jobs. The IBT's experience is that such negotiations are fruitful for all concerned. This results from the proper workings of the collective bargaining system. This system has an important role to play in the reorganization efforts of bankrupt employers.

The IBT thus has a strong stake in the development of a principled body of law regarding the viability of

collective bargaining agreements during bankruptcy proceedings. The IBT is concerned that if rejection of collective bargaining agreements during bankruptcy proceedings is easily permitted, more and more businesses will abuse the procedures to rid themselves of labor contracts. The current record level of bankruptcies makes this a matter of grave concern.

In our view, the lower court's decision in this case, threatens labor-management relations and workers' rights. It conflicts with the federal labor policy of encouraging the maintenance of collective bargaining agreements and proscribing unwarranted judicial interference in labor disputes. It also undermines the important and productive role which free collective bargaining could play in achieving a successful reorganization. The function of the accompanying brief *amicus curiae* is to provide a succinct statement of our position in order to aid the Court in its consideration of these issues of critical importance to workers' rights.

We stress that a debtor-in-possession should be bound to the same labor law and collective bargaining obligations as the pre-bankruptcy employer. Thus, the debtor-in-possession is not free to modify its labor contracts unilaterally, without the participation of the Union. Given the unique status of collective bargaining agreements, rejection of collective bargaining agreements by the debtor-in-possession should be permitted by the bankruptcy court only if it is necessary to save the business from collapse, and even then, only after bargaining in good faith with the Union. In short, bankruptcy proceedings should not detract from the force of the labor laws. A proper accommodation of the Bankruptcy Code with the National Labor Relations Act requires that collective bargaining obligations be honored to the fullest extent.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

This brief *amicus curiae* is filed by the International Brotherhood of Teamsters (IBT) contingent on the granting of the foregoing motion for leave to file a brief as *amicus curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases involve the interplay of two comprehensive statutory schemes: the National Labor Relations Act (NLRA), as amended, 29 U.S.C. § 151 et seq., which defines the rights of workers and the method of making, maintaining, and modifying labor contracts, and the Bankruptcy Code (the Code), 11 U.S.C. § 101 et seq., which permits a financially distressed business to reorganize its operation, restructure its debt, and reject its executory contracts. The issues raised concern the right of companies undergoing reorganization to terminate collective bargaining agreements entered into by the pre-bankruptcy company, and the obligation of bankrupt employers to comply with the labor laws.

The case stems from the 1980 bankruptcy of Bildisco, a New Jersey building-supply company. Even before the bankruptcy, the company unilaterally had ceased making pension and welfare payments required by its collective bargaining agreement with Teamsters Local 408. After the company began to operate, with its previous work force, as a "debtor in possession," it continued to withhold these payments; it also withheld contractually required raises and vacation pay. At no time did Bildisco seek to negotiate with the Union about these contractual changes. After the Union filed unfair labor practice charges with the National Labor Relations Board, the company sought bankruptcy court permission to reject its collective bargaining agreement. The bankruptcy court approved the rejection under § 365 of the Code (11 U.S.C. § 365), and the district court affirmed. The NLRB found that the company had committed unfair labor practices by unilaterally changing the terms of the labor agreement, in violation of NLRA §§ 8(a)(1) and (5) (29 U.S.C. §§ 158(a)(1) and (5)).

The Third Circuit Court of Appeals denied enforcement to the Board's order, holding, in effect, that a

debtor in possession is immunized by the reorganization proceeding, and thereby privileged to make unilateral contract changes which would be unlawful outside of bankruptcy. In the consolidated bankruptcy case, the court held that collective bargaining agreements may be rejected under § 365 of the Code, notwithstanding the conflicting requirements of NLRA §§ 8(a)(5) and (d) (29 U.S.C. § 158(a)(5) and (d)) which govern modification and termination of collective bargaining agreements. Moreover, the court rejected the Union's arguments that a company must first bargain with its employees' representative and then demonstrate that its survival hinges on the contract's termination before it may seek rejection under § 365. The court ruled that the bankruptcy court may approve rejection simply after a " 'thorough scrutiny, and a careful balancing of the equities on both sides.' "

I. The debtor-in-possession is indistinguishable for labor law purposes from the pre-bankruptcy company. *Matter of Brada Miller Freight System, Inc.*, 702 F.2d 890 (11th Cir. 1983). Therefore, it is bound to collective bargaining agreements entered into prior to bankruptcy and by the restrictions of § 8(d), including the prohibition on mid-term contract termination or modification without the consent of the other party. These obligations conflict with Code § 365 authorizing unilateral rejection, with court approval, of executory contracts. The Court must therefore fashion an accommodation of these conflicting provisions and policies.

Treating the debtor-in-possession as a "new entity" not bound by the contract or § 8(d) (*Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975)), is an inaccurate "legal fiction" and sidesteps the statutory conflict and its labor policy implications. The bankruptcy provisions cannot be used to avoid labor law obligations. Thus, unilateral contract changes made without

the consent of the union, prior to a court approved rejection, constitute violations of NLRA § 8(a)(5).

II. A proper accommodation of NLRA § 8(d) and Code § 365 would require that the debtor-in-possession bargain in good faith with the union to impasse before a court could approve contract rejection. If no satisfactory solution were achieved, rejection could then be sought. To allow rejection without this bargaining prerequisite would absolve the debtor-in-possession of any labor law obligations. The collective bargaining process has an important and constructive role to play in the business reorganization context and is flexible enough to adapt to the the exigencies of the business situation. The economic realities make negotiated concessions preferable to outright contract rejection and loss of jobs. Bargaining will benefit the company as well by providing the strong possibility of economic relief and engendering mutual understanding and trust. It will minimize the threat of retaliatory strikes, which unilateral rejection may precipitate, leading to the possible doom of the already ailing company.

III. The public policy basis of national labor laws is that through judicial restraint in labor disputes, the collective bargaining process will be promoted. This will enable workers to achieve an equality in economic power with their employers and will minimize labor strife. Thus, the 1932 Norris-La Guardia Act (29 U.S.C. § 101 et seq.) generally prohibits judicial interference in labor disputes, except in defined circumstances, and then only as a last line of defense, available only if the parties have attempted to negotiate the dispute and failed (§ 8). This § 8 requirement parallels the substantive bargaining duties of NLRA §§ 8(a)(5) and (d) and furnishes further support for our proposed accommodation. Rejection of a labor contract is a blatant form of judicial interference, altering the balance of power heavily in the employer's favor. All indicia show that the reorganization provisions of the bankruptcy law, first enacted in the

1930's concurrently with the NLRA and Norris-La Guardia Act, were not intended to supersede those Acts. Thus rejection should be only a last resort after private settlement efforts have failed.

IV. If negotiations fail, rejection of labor contracts is warranted only if the survival of the business hinges on rejection. *Bro. of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975). This test furnishes an objective basis for judging whether what is otherwise prohibited by the labor laws, i.e., the unilateral termination of a labor agreement during its term, is warranted. It would prevent the total elimination of workers' benefits—many of which are noncompensable in money damages—for antiunion or noneconomic reasons. A less stringent test would discourage private adjustment attempts, and would thereby defeat the public policy underlying our labor laws.

ARGUMENT

I. THE DEBTOR-IN-POSSESSION IS INDISTINGUISHABLE FOR LABOR LAW PURPOSES FROM THE PRE-BANKRUPTCY COMPANY

A. The Statutory Conflict Over the Termination Of Collective Bargaining Agreements

The present cases arises from conflict between the language of two statutes promulgating procedures for the termination of collective bargaining agreements: § 365 (a) of the Bankruptcy Code and §§ 8(a)(5) and 8(d) of the National Labor Relations Act.

Under Code 365(a), a bankruptcy trustee, or debtor-in-possession, may, subject to the court's approval, "assume or reject any executory contract or unexpired lease of the debtor." This section allows the trustee or debtor-in-possession to escape burdensome obligations of the debtor in order to facilitate the "fresh start" envisioned by the Code's reorganization provisions.

Section 8(d) of the NLRA prescribes a set of procedures for termination or modifying collective bargaining contracts, including notice to and offering to meet and confer with the other party regarding the proposed modification or termination. The other party is not obligated, however, to discuss or agree to any mid-term contract modification. Failure to abide by the provisions of § 8(d), including any mid-term contract change made without the consent of the other party, constitutes an unfair labor practice in violation of § 8(a)(5) of the Act. On their face, these provisions thus clash with the unilateral termination permitted by § 365.

B. The "New Entity" Theory

The Second Circuit Court of Appeals was the first to consider whether collective bargaining agreements are executory contracts subject to rejection under § 365, notwithstanding the restrictions of NLRA § 8(d) and national labor policy favoring the maintenance of collective bargaining agreements. In *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975),[1] it tried to sidestep the statutory conflict by resort to a "legal fiction."[2] In its view a debtor-in-possession under Chapter 11 is a "new entity," distinct from the pre-bankruptcy debtor. Analogizing to a successor employer, it reasoned that while the new entity is obligated to comply with the Labor Act, it is not a party to the debtor's collective bargaining agreement,[3] and, therefore,

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[1] *Kevin Steel* arose under § 313 of the Bankruptcy Act (11 U.S.C. § 713) (repealed)) which, for purposes of this case, is identical to § 365 of the Code.

[2] Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 829 (1976).

[3] It relied on *NLRB* v. *Burns Security Services, Inc.*, 406 U.S. 272 (1972), under which a successor employer, while bound to recognize and bargain with the Union, is not generally bound by the substantive terms of the predecessor's labor agreement. Both *Burns*, 406 U.S. at 291, and *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 256 (1974), however, suggest that exceptions to this rule exist.

is not bound by the termination restrictions of § 8(d). It is thus free to seek unilateral rejection of its labor agreements. *Id.*, at 704. See also *Bro. of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 167 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

The Ninth and Third Circuits[4] also adopted this concept. In so doing they have avoided the necessity of accommodating the language and purposes of § 365 and § 8 (d). By ignoring the serious policy and practical consequences of allowing rejection in disregard of § 8(d), the courts have endangered interests protected by the labor laws. Moreover, their concept is not legally accurate; nor does it properly harmonize the two statutes.

Most recently, the Eleventh Circuit Court of Appeals considered this issue. Finding the debtor-in-possession to be "indistinguishable for labor law purposes, from the pre-bankruptcy" company, the court rejected the "new entity" theory as a "legal fiction," with "conceptual inconsistencies which compel us to seek an alternative ground for the resolution of the statutory conflict." *Matter of Brada Miller Freight System, Inc.*, 702 F.2d 890, 895-96 (11th Cir. 1983).

As the *Brada Miller* court correctly discerned, at least two paradoxical questions are raised by the "new entity" fiction. First, if the debtor-in-possession is not a party to the contract, why must it nonetheless apply for permission to reject it? Surely, in requiring that the debtor-in-possession seek permission to reject, Congress obviously contemplated that it was a party to the agreement.[5] Sec-

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[4] *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210 (9th Cir. 1980); *NLRB* v. *Bildisco*, 682 F.2d 72 (3d Cir. 1982), *cert. granted*, —— U.S. ——, 74 L.Ed.2d 992 (1983).

[5] Similarly, why is the rejection treated as a *breach* of the contract (§ 365(g)(1)) if the debtor-in-possession is not a party to it? "The better interpretation is that Congress authorized rejection under § 365 . . . despite its recognition that the debtor in pos-

ond, if the debtor-in-possession is a "non-party," why is it nonetheless bound retroactively to the agreement and accountable for any breaches if its motion for rejection is denied? *Id.*, at 896 and n.15-17.

The Eleventh Circuit Court of Appeals has not been the sole critic of this flawed concept. Other commentators have decried its inaccuracy.[6] As one observed:

> "[I]t is difficult to see how a debtor-in-possession can be truly distinct from its former self. Where there have been no changes in management, except to introduce overall bankruptcy court supervision, any analogy to successor employer situations seems tenuous." [Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy*, 22 Wayne L. Rev. 165, 173 (1975).]

As in this case, the debtor-in-possession is frequently the same management as the debtor,[7] and the same people will generally become the owners of the reorganized company.[8] Indeed, the whole point of the reorganization pro-

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session was a party to the contract . . . ." Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 Mich. L. Rev. 134, 142 n.46 (1981).

[6] See, Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 Minn. L. Rev. 479, 488 (1974) (new legal entity rationale is a "rather rarified conceptionalism."); Note, *Bankruptcy and the Rejection of Collective Bargaining Agreement*, *supra*, 51 Notre Dame Law. at 329; Note, *The Labor-Bankruptcy Conflict*, *supra*, 80 Mich. L. Rev. at 142-148 (successorship "analogy is unhelpful in the reorganization context and obscures the need to balance the policies underlying the conflicting statutes . . . . The courts would reach sounder results if they recognized the conflict between the Code and the NLRA and resolved cases by balancing the relevant policies." *Id.* at 142-43 and 148.)

[7] The Code itself states: "debtor in possession means debtor . . . ." (11 U.S.C. § 1101)

[8] *See NLRB* v. *Baldwin Locomotive Works*, 128 F.2d 39, 43-44 (3d Cir. 1942) ("where managerial control and economic interest

cedure is to revitalize the existing company. "Debtor-in-possession" is merely a label reflecting the bankruptcy court's temporary supervisory role.[9]

Even the author of the "new entity" concept, the Second Circuit, has realized its limitations and restricted its application since its initial promulgation. In *Matter of Unishops, Inc.*, 543 F.2d 1017, 1018-19 (2d Cir. 1976), the court "caution[ed]" that the "new entity" concept should not be used except in cases involving rejection of collective bargaining agreements.[10]

As another court has said, the new entity theory and successor analogy do not "easily translate into other areas of bankruptcy law." *In re Allied Supermarkets, Inc.*, 6 Bankr. Rptr. 968, 976 n.8 (E.D. Mich. 1980).

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of the debtor in possession and the reorganized company are the same it could be only the blindness of formalism that would" differentiate those entities "so far as the employer-employee relationship is concerned.") In this regard, the reorganized company is generally bound to all executory contracts of the debtor not rejected by the debtor in possession and to all agreements assumed by the debtor in possession. 2 *Collier on Bankruptcy* ¶ 365.03[1] (15th ed. 1982).

[9] It is hardly akin to the typical successor company which purchases its predecessor, become merged into it, or replaces it in supplying a service. *Cf. Burns, supra*, 406 U.S. 272; *Howard Johnson Co.* v. *Hotel Employees, supra*, 417 U.S. 249; *John Wiley and Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964). Nor are the policy reasons for freeing a successor from its predecessor's labor contracts apt in the reorganization case. See, generally, Note, *The Labor-Bankruptcy Conflict, supra*, 80 Mich. L. Rev. 144-45.

[10] *See also Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312, 320 (2d Cir. 1976) ("new entity" theory developed "for the narrow purpose of resolving otherwise conflicting provisions of the labor and bankruptcy laws . . . . Of course, the statement that the debtor is not a 'party', and the analogy to the successor employer, cannot be taken literally, since neither affirmance nor rejection of the collective bargaining agreement would be possible by one not a party to it.")

The "new entity" should be viewed as what it really is, an after-the-fact rationalization of judicially abrogating § 8(d). Given the limited utility of this "legal fiction" (*Matter of Brada Miller Freight System, supra*, 702 F.2d at 897), not to mention its inaccuracy, it is far more logical for this Court to acknowledge that the debtor-in-possession is bound to the agreement, and to § 8(d),[11] and that, therefore, the two statutes do clash. An accommodation serving all purposes can then be designed. As Justice Frankfurter observed in an earlier case involving the interplay of these two laws, "supplying the rule for conflicts unanticipated by Congress is a large part of our work." The task was therefore to find a "practical solution of this question that accomplishes the purposes both of the Bankruptcy Act and the National Labor Relations Act." *Nathanson* v. *NLRB*, 344 U.S. 25, 32 (1952) (dissenting opinion).

C. Unilateral Contract Modifications

If the debtor-in-possession is properly viewed as being indistinct from its former self for labor relations purposes, and thus bound to the debtor's contract and to § 8 (d), then unilateral mid-term contract changes prior to rejection violate § 8(a)(5).[12] In using the "new entity"

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[11] Labor law obligations "can not be avoided by reorganizations, transfers, or any other 'disguised continuance.'" *NLRB* v. *Coal Creek Coal Co.*, 204 F.2d 579, 580 (10th Cir. 1953), *citing Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100 (1942). "[T]he Bankruptcy Act . . . does not authorize a debtor-in-possession to ignore its obligations under the Labor Act." *Kevin Steel, supra*, 519 F.2d at 706. Moreover, NLRA § 2(1) and (2) specify that bankruptcy trustees (or debtors in possession, by definition of Code § 1107) are subject to the Act as "employers."

[12] Even under the successorship analogy, when it is clear that a debtor-in-possession plans to retain substantially all of its employees, as Bildisco did, it must consult initially with their union representative before fixing employment terms. *Burns, supra*, 406 U.S. at 294-95. Failure to do so violates § 8(a)(5) of the Act. *See, e.g., NLRB* v. *World Evangelism, Inc.*, 656 F.2d 1349 (9th Cir. 1981).

theory to immunize the debtor-in-possession from this clear unfair labor practice, the court below ignored the Second Circuit's words of caution that the test be applied only in bankruptcy cases involving the rejection of collective bargaining agreements. *Truck Drivers Local 807* v. *Bohack Corp.*, *supra*, 541 F.2d at 320. Indeed, it specified that the mere filing of a Chapter 11 petition "does not mean that the agreement ceases to exist." Thus, a debtor "may not abrogate a contractual obligation save by statutory or judicial permission." *Id.* at 319.

Under the Code, rejection is permitted *only* with the express approval of the court. Until then, the contract remains in effect,[13] and the debtor-in-possession is obligated to abide by its substantive obligations.[14] Privileging the debtor-in-possession unilaterally to modify the terms of the contract, while the employees continue to perform their end of the bargain, neglects a basic principle of equity, mutuality of obligations and performance. The employer is free to dictate new terms of employment, but employees, with no option short of quitting their jobs, are bound at the whim and caprice of their employer to continue to furnish valuable services under terms to which they have not agreed. *See In re W.T. Grant Co.*, *supra*, 620 F.2d at 320. This substitutes a system of workplace democracy for one of management autocracy.

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[13] 2 *Collier on Bankruptcy*, ¶ 365.03 (15th ed. 1982). *In re W.T. Grant Co.*, 474 F. Supp. 788, 793 (S.D. N.Y. 1979), *aff'd. per curiam*, 620 F.2d 319, 321 (2d Cir. 1980), *cert. denied*, 446 U.S. 983 (1980); *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977).

[14] *In re Connecticut Celery Co.*, 106 L.R.R.M. 2847, 2851 (Bkrtcy., D. Conn. 1980) ("a debtor in possession who abrogates contractual obligations of a labor agreement without the permissions of a bankruptcy court does so at its peril.")

II. COLLECTIVE BARGAINING AGREEMENTS CAN NOT BE REJECTED ABSENT COMPLIANCE WITH THE DUTY TO BARGAIN

A. The Bargaining Obligation

A requirement that the debtor-in-possession bargain with the union over needed mid-term contract concessions before proceeding to the bankruptcy court to seek total rejection of the collective bargaining agreement would contribute to an "accommodation of the two [statutes] which will give the fullest possible effect to the central purposes of both." *Sinclair Ref. Co.* v. *Atkinson*, 370 U.S. 195, 216 (1962) (Brennan, J. dissenting). *See* Note, *The Labor-Bankruptcy Conflict*, *supra*, 80 Mich. L. Rev. at 148-152.[15]

Under this scheme, a debtor-in-possession in need of relief would have to notify the union of proposed contract modifications, afford an opportunity to negotiate about them, and bargain in good faith to impasse. A satisfactory compromise would hopefully be reached. If not, the debtor-in-possession would then be free to seek rejection. Or, if the union was unwilling to meet, rejection could be sought immediately. The bankruptcy court could then permit rejection if necessary to ensure the success of the reorganization. To permit rejection without a bargaining prerequisite, even under the stringent standard of *REA Express*, *supra*, 523 F.2d at 172, would absolve the debtor-in-possession of any Labor Act responsibilities. It would result not in accommodation, but in a total abrogation of the labor laws. A bargaining prerequisite, however, would preserve the collective bargaining machinery to the fullest extent possible. The debtor-in-possession

[15] At least one bankruptcy court has already recognized the uselessness of the "new entity" concept and accommodated both statutes as we suggest. *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. Rptr. 462, 465-6 (S.D. Cal. 1982). It is clear that courts have power to implement a bargaining requirement, as the Code gives them discretion over contract rejections. 11 U.S.C. § 365(a).

would be forced to comply with certain NLRA duties; if rejection is ultimately allowed, the § 8(d) prohibition against unilateral mid-term contract termination would be compromised, but the §§ 8(a)(5) and (d) bargaining obligation will have been fulfilled.

B. The Utility of the Bargaining Obligation

The goal of the NLRA is that "free opportunity for negotiation with accredited representatives of employees" will "promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin*, *supra*, 301 U.S. at 45 (1936). Certainly the realization of this goal furthers the aim of the reorganization proceeding. It then makes eminent sense to allow the process to work.

Concededly, economic relief from collective bargaining agreements may be desirable to businesses undergoing reorganization. In such cases, the union can provide financial concessions, realizing that the company's collapse is hardly in the best interest of its members.[16] Raw economic realities demand union willingness to renegotiate with a financially troubled employer, even at the expense of industry uniformity in wages and conditions. Thus, the Court need not fear that union intransigence will make the bargaining obligation a time-consuming, futile effort.[17]

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[16] For an illustration of debtor-in-possession-union cooperation, see *In re Allied Supermarkets*, *supra*, 6 Bankr. Rptr. at 970. *See also A Louder Union Voice in Settling Bankruptcies*, Business Week, December 8, 1980.

[17] Indeed, this Court has noted its awareness of "past instances where unions have aided employers in saving failing businesses by lending technical assistance, reducing wages and benefits or increasing production, and even loaning part of earned wages to forestall closures." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 681 n.19 (1981). Similarly, "labor history is replete with

Certainly, where economies can be derived from concessions in matters within the union's control, the collective bargaining process is uniquely suited to the resolution of this predicament.[18] Moreover, the union may also be able to suggest cost-saving operating procedures that will minimize the impact on workers of needed reductions.

Successful bargaining over these matters, by this Union, as well as others, is widely reported today.[19] Even if the negotiations are not fruitful, by affording workers a voice in contract modification, a company engenders mutual understanding and assures employees that its problems are real. Such trust is invaluable if the parties are to devise constructive measures to ease the company's problems. A demonstrated regard for employees' interests through advance notice and frank discussion of needed contract concessions will maximize the chances of a peaceful reorganization process and lessen the strike threat that unilateral termination may

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instances where a union has cooperated actively with an employer to keep a company financially afloat and thus to prevent the closing of a facility and the loss of jobs." *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720, 736 (3d Cir. 1978).

[18] *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), finding a mandatory duty to bargain over a decision to subcontract work performed by union employees because the reason for the decision to contract out—that "economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments"—all were matters within the union's control and "peculiarly suitable for resolution within the collective bargaining framework." *Id.* at 213-14.

[19] *E.g.*, *World Airways Wins Concessions by [Teamsters] Union*, Los Angeles Times, Nov. 10, 1982; *Teamsters Agree To Tentative Pact with Concessions*, New York Times, Jan. 16, 1982; *Concessionary Bargaining*, Business Week, June 14, 1982; *G & W Has Received Union Concessions; Plant Closings Averted*, Wall Street Journal, July 12, 1982; *The Payoff of Wage Moderation*, Business Week, January 18, 1982.

pose. Note, *The Labor-Bankruptcy Conflict*, *supra*, 80 Mich. L. Rev. at 152.

A bargaining requirement serves another beneficial purpose. It enables the parties to modify only the burdensome terms of the contract, leaving workers protected from the loss of unburdensome benefits. "Rejection, however, is an all or nothing proposition." Note, *Labor-Bankruptcy Conflict*, *supra*, 80 Mich. L. Rev. at 152. The company cannot seek, nor can the court order, that certain portions of the agreement be retained. While the company must renegotiate the contract after rejection, there is a risk that workers "may not only receive smaller pay checks, but may lose accrued seniority credit," vacation, and other valuable benefits. *Id.*

In contrast to a negotiated compromise, rejection of a labor contract leaves the union and its members remediless. While they retain the right to strike (*Truck Drivers Local 807* v. *Bohack*, *supra*, 541 F.2d at 318), such a strike may very well be self-defeating if the company is verging on collapse. The Union may also treat the rejection as a breach of the contract and become a general creditor for whatever damages are provable. Damages, however, will not compensate for the intangible benefits lost in the rejection, and will be satisfied only after the claims of preferred creditors.[20] Faced with this woeful alternative, unions will be apt to overcome their reluctance to engage in mid-term concession bargaining to avoid the drastic consequences of outright contract rejection.

Moreover, such negotiations can only benefit the company. If they succeed, the company will obtain relief and then be able to approach its creditors for further relief with specific predictions as to labor costs. Contract rejection, on the other hand, will remove this

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[20] *See, e.g.*, Note *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 830-31 (1976); Note, *Corporate Reorganization and the Right of Labor*, 53 Harv. L. Rev. 1360, 1363 (1940).

element of certainty and might precipitate a retaliatory strike which could easily spell the demise of the company. Thus, collective bargaining will minimize industrial strife, which is of crucial importance in the case of ailing businesses.

If negotiations fail, nothing in the Act forces an employer "to engage in fruitless marathon discussion." [21] *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952). When impasse is reached, rejection can be sought.

C. Section 1167 of the Code and the Railway Labor Act Machinery For Voluntary Adjustments of Labor Management Disputes

Section 1167 of the Code (11 U.S.C. § 1167) specifically exempts collective bargaining agreements subject to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, from rejection under § 365. Congress chose instead to allow the elaborate § 6 Railway Labor Act (45 U.S.C. § 156) procedures for the modification and termination of contractual terms to substitute for the rejection procedure. "The subject of railway labor is too delicate and has too long a history for this Code to upset established relationships . . . [§ 1167] continues this balance unchanged." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 423 (1977).

Contrary to the federal appellate courts which have considered § 1167, including the court below,[22] the ab-

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[21] The system of collective bargaining is flexible enough to adapt to the exigencies of the business situation. If the economic circumstances are truly drastic, and the union can offer no sufficient concession, then an impasse in the negotiations that would permit the employers to seek rejection will be reached far sooner than where there is ample time for negotiations, or where the union is in a position to alleviate conditions and is advancing meaningful alternatives.

[22] *Matter of Brada Miller Freight System, supra*, 702 F.2d at 897; *Bildisco, supra*, 682 F.2d at 78. *See also, REA Express, supra*,

sence of a Code provision, comparable to § 1167, governing NLRA contracts, does not mean that such contracts are subject to § 365 without regard to NLRA § 8(d) requirements. Indeed, when the forerunner of Code § 1167 was enacted in 1933 (§ 77(n), 11 U.S.C. 205(n) (repealed)), the NLRA had not yet been passed. But the provision "indicate[d] an intent to specially treat the collective bargaining agreements existing in federal labor legislation." Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, *supra*, 51 Notre Dame Law. at 826. Then, when the NLRA was enacted in 1936, it contained no termination or modification provisions, simply § 8(5), making it an unfair labor practice for employers to refuse to bargain; § 8(d) was not added to the Act until the 1947 Taft-Hartley Amendments.

Thus, our proposed accommodation of the two statutes conforms with the original statutory interplay. Congressional silence as to the accommodation after § 8(d) was enacted, likely a matter of legislative oversight, does not detract from our argument. Thus, we do not urge in this case that NLRA contracts are totally exempt from § 365, or that § 8(d) termination restrictions *in toto* should substitute, as do § 6 RLA procedures, for the rejection process. Rather, we suggest that § 8(a)(5) and (d) bargaining requirements be a prior condition to § 365 rejection. Ideally, the negotiations will be fruitful and will, in fact, substitute for § 365, but rejection would be available as a last resort should voluntary adjustment fail.

The flexibility of NLRA bargaining requirements (*supra*, note 21) makes them easily reconcilable with the reorganization proceeding. No special Code provision,

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523 F.2d at 169, and *Kevin Steel*, *supra*, 519 F.2d at 704, dealing with § 77(n) the forerunner to § 1167 ("Congress knew how to remove labor agreements from the scope of a general power to reject executory contracts.")

comparable to § 1167, is necessary to achieve this accommodation; it is self-actualizing. By contrast, the Railway Labor Act prescribes a machinery which is "more complex than that of any other industry." *IAM* v. *Street*, 367 U.S. 740, 755 (1961). The procedures, involving direct conference, mediation, and voluntary binding arbitration, "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute," and avoids strikes. *Railway Clerks* v. *Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966).

This "interminable process" (*Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 149 (1969)), is to a large extent within the control of the National Mediation Board, which is empowered with vast discretion in mediating the dispute. The Board can continue mediation as long as it deems warranted. It will decide whether further mediation is likely to yield an agreement, or whether the parties should be released from mediation to resort to self-help.[23] In the case of an ailing carrier, the National Mediation Board will make these determinations based on the carrier's financial condition, and an analysis of its ability to survive without immediate contract concessions. The likelihood of labor strife caused by unilateral action, and its impact on the carrier, are also factors considered by the Board in determining whether to prolong the status quo or release the parties to their self-help remedies.

No comparable governmental control is exerted over NLRA contract modifications or terminations. The par-

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[23] Thus a party desiring to end mediation under the RLA must come forward with objective facts showing that the NMB is continuing "mediation on a basis that is completely and patently arbitrary . . . notwithstanding the lack of any genuine hope or expectation that the parties will arrive at an agreement." *IAM* v. *NMB*, 425 F.2d 527, 537 (D.C. Cir. 1970). "[N]o party has been able to meet the burden and win a judicially ordered end to mediation." *Seaboard World Airways, Inc.* v. *Teamsters Local 851*, 501 F. Supp. 47, 50 (E.D. N.Y. 1980).

ties control the process themselves, subject to the NLRB's unfair labor practice authority. But, in both systems there is a paramount concern with strike avoidance. *See NLRB* v. *Jones & Laughlin*, *supra*, 301 U.S. at 42. This concern is particularly crucial for ailing businesses. Thus, the collective bargaining process should be permitted to work, just as much as the § 6 procedures.

Nothing is lost by this for the parties can quickly bring a dispute to impasse if nothing is to be gained from prolonging negotiations. This distinguishes the process from the intricate and prolonged RLA procedures. Thus, lacking the flexibility of the NLRA system, the § 6, RLA mechanism could not be self-imposed upon the rejection process. Accordingly, § 1167 provides for the RLA provisions to take precedence. But the existence of § 1167, and Congressional silence in the Code as to NLRA contracts, can not be interpreted to eviscerate entirely the NLRA obligations.

III. JUDICIAL RESTRAINT IN LABOR MANAGEMENT DISPUTES IS REQUIRED EVEN UNDER THE EXERCISE OF BANKRUPTCY POWER

A. Judicial Restraint and the Bankruptcy Power

In rejecting a collective bargaining agreement a bankruptcy court clearly interferes in the collective bargaining process and upsets the balance of bargaining power achieved by the free play of economic forces. This destroys the very underpinning of our national labor policy. Unwarranted judicial interference in labor disputes historically was a major cause of social unrest in this country and was one of the prime factors behind the passage of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, and also the NLRA.[24]

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[24] Frankfurter & Greene, *The Labor Injunction* 206 (1930) "That the exercise of their powers in labor controversies has harmfully implicated the federal courts cannot be gainsaid. . . . [P]ower-

The Norris-LaGuardia Act was passed in 1932 to deprive federal courts of jurisdiction to issue injunctions "in a case involving or growing out of a labor dispute," except in unusual or defined circumstances. One of the restrictions of this Act, § 8, denies injunctive relief to any party who has not attempted to settle the labor dispute by negotiation or resort to available governmental machinery for mediation or voluntary arbitration (29 U.S.C. § 108). Thus, it made "injunction a last line of defense, available not only after other legally required methods, but after all reasonable methods as well, have been tried and found wanting. This purpose runs throughout the Act's provisions. It is dominant and explicit in § 8." *Bro. of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U.S. 50, 58-59 (1944).

The underlying theoretical basis of the Norris-LaGuardia Act was that preventing judicial interference in labor disputes would promote employer recognition of unions and further nonjudicial practices of collective bargaining for the resolution of labor disputes. Through freedom of association and collective bargaining, organized labor would grow in strength. Through this growth, labor would achieve a comparable bargaining power with capital. *See* § 2 Norris-LaGuardia (statement of policy) (29 U.S.C. § 102).

While Norris-LaGuardia provided a shield against judicial interference, it did little to promote the growth of organized labor and the development of collective bargaining in industry. This state of affairs, coupled with grim economic realities, led Senator Robert Wagner to introduce "one of the most drastic legislative innovations of the decade. It threw the weight of government behind the right of labor to bargain collectively, and compelled employers to accede peacefully to the

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ful opinion . . . asks whether the federal courts must continue . . . 'to take up the shock of our industrial welfare.'"

unionization of their plants." [25] Of central importance, it made these rights legally enforceable by creating an independent agency to conduct representation elections and to restrain business from committing "unfair labor practices."

The 1935 Wagner Act was intended to accomplish the same goals as the Norris-LaGuardia Act. By empowering workers to act collectively they would achieve the means to "deal on an equality with their employer." *NLRB* v. *Jones & Laughlin, supra*, 301 U.S. at 33. The redress of this "discrepancy in economic power between labor and management" (*Matter of Brada Miller Freight, supra*, 702 F.2d at 902) would, in turn, minimize labor strife. *Jones & Laughlin, supra*, 301 U.S. at 42. See also § 1 NLRA (Declaration of Policy) (29 U.S.C. § 151).

Congress thus entrusted the fate of labor and capital to the free play of economic forces, removing the federal judiciary from the arena.[26] Judicial intrusion was warranted strictly as a "last line of defense, available only after" the collective bargaining process had "been tried and found wanting," and then only in unusual and extreme circumstances. *Bro. of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad, supra*, 321 U.S. at 59.

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[25] William E. Leuchtenberg, *Franklin Roosevelt and The New Deal* 151 (1963).

[26] This Court has repeatedly admonished the federal courts, the states, and the NLRB, not "to upset the balance of power between labor and management expressed in our national labor policy." *Teamsters Union Local 20* v. *Morton*, 377 U.S. 252, 260 (1964). "Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces." *Local 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 144 (1976). This free play of economic forces "is part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer, and the community." *Teamsters Union Local 20* v. *Morton, supra*, 377 U.S. at 259.

Like the labor laws, the bankruptcy reorganization provisions were Depression era enactments. "Before the [June 7, 1934] enactment of § 77B. . . the bankruptcy mechanism was designed for the final liquidation" of the company. *SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 448 (1940).[27] Rather than doom countless businesses to utter destruction, the reorganization provisions were designed to afford a rescue.[28]

There is no evidence that these bankruptcy provisions were intended to supersede the concurrently enacted labor laws. Indeed, *all* indicia show that labor policy, formulated at a time of record bankruptcies, would govern in matters involving companies in reorganization. Thus, for example, the NLRA specifically covered trustees in bankruptcy in § 2(1) and (2) (29 U.S.C. § 152(1) and (2)).

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[27] In 1934, § 77B was added to the Bankruptcy Act (48 Stat. 911), providing for corporate reorganization. This was replaced by Chapter X (Corporate Reorganization) of the 1938 Chandler Act Amendments. 6 *Collier on Bankruptcy*, ¶¶ 0.01, 0.12 (14th ed. 1978). This chapter, plus Chapters XI (Arrangements) and XII (Real Property Arrangements), also added in 1938, are now consolidated into Chapter 11 of the Code.

[28] These provisions were "designed not only to aid in solving the difficulties into which many corporations had been precipitated but also to correct the defects and vices of the previous federal equity receivership procedure and to supplant it as a means of effecting reorganization." 6 *Collier on Bankruptcy*, ¶ 0.05 at 61-63 (14th ed. 1978). Coincidentally, the abuses and vices of the equity receivership procedure also, at least in part, compelled the enactment of the Norris-LaGuardia Act. Compare, *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U.S. 216, 218-19 (1936) ("The evils and embarrassments that brought § 77B into existence are matters of common knowledge. . . . At times the receivership was used as an instrument of fraud or covin"), with *United States* v. *United Mine Workers*, 330 U.S. 258, 320 (1947) (concurring opinion) (concerning the Norris-LaGuardia Act: "No series of cases contributed more to the feeling that the federal courts abused their equity jurisdiction than those involving employees of railroads in equity receivership.")

Also, § 77B(l) and (m) of the Bankruptcy Act guaranteed employees of companies in reorganization freedom from interference in their organizational rights, and prohibited "yellow-dog" contracts (i.e., agreements conditioning employment on non-membership in labor organizations or membership in a company union). Correspondingly, NLRA § 14 (now § 15, 29 U.S.C. § 165) specifically provided that in cases of conflict with Bankruptcy § 77B(l) and (m), the NLRA would prevail.[29] *See, NLRB* v. *Baldwin Locomotive Works, supra*, 128 F.2d at 44.

Similarly, § 14 of the Norris-LaGuardia Act (29 U.S.C. § 114) provided that all laws in conflict with it were repealed, and numerous courts have found that Act's provisions controlling in bankruptcy contexts.[30] As the Tenth Circuit Court of Appeals said in an early case, the reorganization provisions were "not intended and may not be used as an avenue of escape by a company from the provisions of the Norris-LaGuardia Act in a labor dispute with its employees. . . . There is nothing in the Norris-LaGuardia Act which exempts equity receiverships of any kind from its provisions." *Int'l. Bro. of Teamsters* v. *Quick Charge, Inc.*, 168 F.2d 513, 516 (10th Cir. 1948).[31]

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[29] When § 77B(l) and (m) became § 272 (29 U.S.C. § 672) (repealed) with the Chandler Act, NLRA § 14 was changed accordingly. While § 272 is now repealed, § 14 remains in the NLRA, now as § 15.

[30] *Truck Drivers Local Union No. 807* v. *Bohack Corp., supra*, 541 F.2d at 318 (Norris-LaGuardia Act, and in particular § 8, controlling in reorganization proceedings: "The argument is made that to allow picketing in the case of this financially troubled debtor is to put it out of business. . . . But the policy of our labor laws is simply to provide rules for the handling of labor disputes, not to prohibit the use of economic power in the resolution of such disputes.")

[31] *Accord In Re Third Avenue Transit Corp.*, 192 F.2d 971, 973 (2d Cir. 1951) ("The well established power of the reorganization court to issue orders necessary to conserve the property in its cus-

Thus, there is no evidence, and it is inconceivable, that in enacting the bankruptcy laws, Congress silently authorized the federal judiciary to take sides in labor controversies or enabled management to exploit bankruptcy courts' equity powers to fight labor.

B. Rejection as a Last Line of Defense

Yet, when a court approves rejection of a collective bargaining agreement, it enters the labor dispute and tips the balance of power in favor of the employer. While the employer is obligated to attempt to renegotiate the agreement after rejection, the union's bargaining power will have been greatly diminished by the rejection. Concessions will be forced on labor alone. The ensuing negotiations will be little more than a rubber stamp of the changes which the court has already ruled necessary to avoid collapse of the business. In other words, the new contract will be one dictated by the court rather than one collectively bargained by the parties.[32]

Management will be able to achieve a better price for labor, not by its bargaining strength—or the free play of economic power—but by judicial interference. With union bargaining power weak at this point, management will have little incentive to restore intangible, nonburdensome protections to the contract. In this fashion, workers will lose what they have won through the free play of their collective bargaining strength. The bankruptcy court will

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tody must be exercised within the scope of a jurisdiction which is limited by the broad and explicit language of the Norris-LaGuardia Act."); *Petrusch* v. *Teamsters Local 317*, 667 F.2d 297, 300 (2d Cir. 1981) (Automatic stay provisions of Code do not supersede Norris-LaGuardia Act even though the latter is not mentioned in the Code. "Such omissions are to us self-evident proof that Congress never intended to supersede or transcend it, since we cannot believe the Norris-LaGuardia Act was to be superseded, *sub silentio*.")

[32] Section 8(d) prohibits the NLRB and the courts from dictating contract provisions, *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).

usurp the collective bargaining process and take away from workers what is given them by national labor policy. While employer-debtors may seek to enlist the federal judiciary in taming the labor movement, the courts should be loathe to participate in an affair so at odds with national policy and justice.

Properly viewed in this fashion, rejection of collective bargaining agreements should not be permitted by the bankruptcy court if the debtor-in-possession has "failed to make every reasonable effort to settle [the] dispute . . . by negotiation." This § 8 Norris-LaGuardia Act requirement is equivalent to the NLRA §§ 8(a)(5) and (d) duty to bargain in good faith, and furnishes additional grounds for making bargaining a prerequisite to rejection.[33] As intended by Congress, imposition of this § 8 requirement will safeguard against unwarranted judicial intrusion in labor controversies.

IV. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IS NOT WARRANTED UNLESS THE DEBTOR-IN-POSSESSION CAN SHOW THAT ABSENT REJECTION THE BUSINESS WILL FAIL

Should negotiations fail, rejection of labor contracts "should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will

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[33] This accommodation conforms with the interplay of these statutes when enacted. While § 77B was enacted before the NLRA, the Norris-LaGuardia Act was then in effect. By 1938, when the Chandler Act amendments were added, the Wagner Act had been passed containing § 8(5), making it an unfair labor practice for employers to refuse to bargain collectively. (§ 8(5) was the forerunner to § 8(a)(5); § 8(d) was not enacted until 1947 with the Taft-Hartley Amendments). Thus, what co-existed in 1938 when the reorganization procedures were crystallized in the Bankruptcy Act, were the right to reject executory contracts contained in Chapters X and XI, the Norris-LaGuardia Act, including § 8, and § 8(5) of the Wagner Act.

no longer have their jobs." *REA Express, supra*, 523 F.2d at 172.

As discussed, rejection is an "all or nothing" proposition (*supra*, p. 15). With the termination of the contract, workers lose not only strictly monetary items, but intangible benefits such as seniority and pension rights, health and welfare coverage, grievance arbitration procedures, and protections against unjust discharge. The Union also loses certain protections of its status, such as union security provisions, which have no bearing on the company's financial condition. These intangible benefits " 'are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors.' " *Kevin Steel, supra*, 519 F.2d at 707, quoting *In re Overseas National Airways*, 238 F. Supp. 359, 361-62 (E.D. N.Y. 1965).

In light of the drastic consequences of rejection, virtually all courts have agreed that the principles of law governing rejection of ordinary commercial contracts are wholly inapplicable to collective bargaining agreements.[34] Thus, while commercial contracts may be rejected simply "upon a showing that rejection would benefit the estate . . . this minimal burden is insufficient to protect the special rights accruing to employees under the federal labor laws." *Matter of Brada Miller Freight, supra*, 702 F.2d at 899.

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[34] The Second Circuit has so stated in *Kevin Steel, supra*, 519 F.2d at 707, and *REA Express, supra*, 523 F.2d at 172; as has the Eleventh in *Matter of Brada Miller Freight, supra*, 702 F.2d at 899, and the court below, *Bildisco, supra*, 682 F.2d at 79. The Ninth Circuit in *Local Joint Executive Board* v. *Hotel Circle, supra*, 613 F.2d at 213 n.2, expressly declined to decide what standard was appropriate for rejection.

Moreover, before the Third Circuit's decision in this case, most courts, relying on the *REA Express* standard, permitted labor contract rejection only if essential to the business' survival.[35] But in the Third Circuit's view, the unique rights of workers would be adequately protected merely by balancing the equities.[36] *Accord, Matter of Brada Miller Freight, supra*, 702 F.2d at 900. This vague and subjective standard, however, has serious shortcomings. In the first place, it lacks objective criteria. Thus, the court's inquiry may easily slip into the mere "business judgment" rule of ordinary commercial contracts. This may result from the bankruptcy courts' inexperience in labor matters or from bias.[37]

Indeed, while the Third Circuit purported to balance the equities, its articulations parrot the "business judg-

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[35] *Cf. Matter of Brada Miller Freight, supra*, 702 F.2d at 900 and cases cited at n.25.

[36] The Third Circuit relied on the holding in *Kevin Steel, supra*, 519 F.2d at 707, that rejection is proper "only after thorough scrutiny, and a careful balancing of the equities." In its view *Kevin Steel* and *REA Express* enunciated two different rules, and the latter was too stringent. A better way to view the discrepancy in language between these two Second Circuit decisions, however, is that *REA Express*, decided just a few weeks after *Kevin Steel*, "is merely a fuller articulation of the somewhat loosely-worded standard of *Kevin Steel*." (*Matter of Brada Miller Freight, supra*, 702 F.2d at 900.) Until *Bildisco*, most courts did just that.

[37] Since the function of the bankruptcy court is solely to oversee the bankruptcy laws, "it can be argued that the court may be unduly sympathetic to the 'equities' favoring the debtor-in-possession." Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements, supra*, 51 Notre Dame Law. at 832. Also, the legislative history of the Bankruptcy Code discusses the "unusually close relationship between the bankruptcy judges and the bankruptcy bar, especially the debtors' and trustees' bar." This had led to a feeling "that there is a 'bankruptcy ring' that has an inside track on all bankruptcy matters, including the judges' favoritism." H.R. Rep. No. 595, 95th Cong., 2d Sess. 95. That Report also discussed the "isolation of the bankruptcy bench and bar from the mainstream of American jurisprudence." *Id.* at 96.

ment" test. In its view, the weighing of equities rule properly treats "the interests served by the Labor Act" as roughly equal to "those of the debtor's other creditors." 682 F.2d at 81. The debtor first must show that the contract is burdensome. In balancing the equities, "the polestar is to do equity between claims which arise under the labor contract and other claims against the debtor." The bankruptcy court must consider the "possible "sacrifices which other creditors are making,' " and whether rejection will "assist" a reorganization. *Id.*

This language sacrifices the superior interests which employees have over other parties affected by a bankruptcy. *See, Matter of Brada Miller Freight, supra,* 702 F.2d at 899. It disregards the hard fact that the irreparable destruction of workers' benefits is far more radical than the relatively simple renegotiation of rights undertaken by all creditors in a reorganization proceeding. Commercial creditors can spread the risk of one transaction failing. But workers do not have this capability; they have invested solely in, and are totally dependent on, one employer for their economic livelihood and quality of work-life.

Treating workers on a parity with other creditors also ignores this Court's repeated judgment that "a collective bargaining agreement is not an ordinary contract. . . . Central to [its] peculiar status and function . . . [is] that it is not in any real sense the simple product of a consensual relationship." *John Wiley & Sons* v. *Livingston, supra,* 376 U.S. at 550, quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960).[38]

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[38] Prior to the 1947 Taft-Hartley amendments to the NLRA, the collective bargaining agreement was not even perceived by the legal community as a "contract" at all. Chamberlain, *Collective Bargaining and the Concept of Contract,* 48 Col. L. Rev. 829, 832 (1948). Accordingly, commentators writing contemporaneously with the 1938 Bankruptcy Act amendments opined that it would be a "rare case" where rejection of such agreements would be

Certainly, any financial obligation is burdensome to a failing business, and "given a choice, [any debtor] would rather pay lower non-union labor costs." *In re Connecticut Celery Co., supra*, 106 L.R.R.M. at 2852. But rejection should be the rare case, for it enables "an employer [to] accomplish under the Bankruptcy Act what it could not accomplish by any other means, i.e., the unilateral termination of a labor agreement during its term." LaPenna, *Bankruptcy and the Collective Bargaining Agreement*, 29 N.Y.U. Lab. Conf. 169, 176 (1979). "[T]he potentialities of this device are considerable," and suggest "the possibility that [bankruptcy proceedings] may be used as a solvent for labor difficulties." Note, *Corporate Reorganization and the Rights of Labor, supra*, 53 Harv. L. Rev. at 1360. *See, e.g., In re Figure Flattery, Inc.*, 88 Lab. Cas. (CCH) ¶ 11.850 (S.D.N.Y. 1980).

While employers once may have been reluctant, because of the fear of retaliatory action, to use bankruptcy as a ploy to rid themselves of unions (*see, Kevin Steel, supra*, 519 F.2d at 705-06), in the current economic depression and social climate increasingly hostile to organized labor, that possibility is no longer unthinkable. With the recent dramatic rise in the number of bankruptcies filed, there has been an alarming increase in the use of Chapter 11 to reject collective agreements.[39] Indeed, the Third Circuit's fear that the stringent *REA Express* test erects "impossible barriers to rejection" (682 F.2d at 79) is refuted by the reported cases.

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allowed. 6 *Collier on Bankruptcy*, ¶ 3.23 at 576 (14th ed. 1978). "The suggestion that labor should assume business risks and suffer its rights to be adjudicated in bankruptcy seems to overlook the fact that a labor agreement is not a business transaction . . . but more closely resembles an armed truce . . . . Note, *Corporate Reorganization and the Rights of Labor, supra*, 53 Harv. L. Rev. at 1363-64.

[39] *See Firms Using Bankruptcy To Fight Labor*, Wall Street Journal, March 30, 1983.

To prevent the rejection avenue from being abused for anti-union or non-economic purposes, it should be available only if labor costs are the obstacle to recovery. If the test is less stringent, an employer will be able to exploit this legal mechanism to rid itself of unwanted labor contracts.[40] It will also discourage the employer from seeking to negotiate concessions with the union. For if rejection of the entire contract is possible, that may be more appealing than solely economic relief. Once the contract is rejected, ridding itself entirely of the union may be easy to achieve. Thus, only if jobs are truly at stake is rejection warranted.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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[40] Thus, *In re Southern Electronics*, 23 Bankr. Rptr. 348 (E.D. Tenn. 1982), appeal docketed No. 83-5059 (6th Cir.), cited *Bildisco* in allowing the debtor to reject because of seniority provisions it wanted to eliminate.